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FISCAL IMPACT REPORT

SPONSOR: Pinto DATE TYPED: 3/08/03 HB _____

SHORT TITLE: Navajo Nation Special Fuels Tax Agreements SB 867

ANALYST: Reynolds-Forte

REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY03	FY04			
	(978.0)*	Larger**	Recurring	State Road Fund
	(122.0)	Larger**	Recurring	Local Governments

(Parenthesis () Indicate Revenue Decreases)

*The fiscal impact assumes that the geographic area where the Navajo Nation Fuel Tax is imposed is within the strict boundaries of the Navajo “Reservation” during the first year, however, the bill’s provisions are subject to various possible interpretations (see Legal Issues) that could ultimately result in a **negative fiscal impact of many millions of dollars**.

The fiscal impact in FY04 is uncertain. It is unclear whether the tax credit would apply before a cooperative agreement is entered into between the Taxation and Revenue Department and the Navajo Nation, and the timing of such an agreement cannot be predicted. The Department is attempting to gather information regarding diesel fuel sales within the Navajo Nation boundaries, but the Navajo Tax Commission has not yet responded. **Assuming, for purposes of illustration only, a very narrow interpretation of the applicable geographic area, and a loss of state tax on approximately 6 million gallons of diesel fuel, the negative fiscal impact would be approximately \$1.1million (a loss of \$978.0 to the State Road Fund, and a loss of \$122.0 to the Local Governments Road Fund).**

(Larger)** – The fiscal impact in subsequent years depends on the interpretation of the geographic definition of the term Navajo “Nation” (see Legal Issues), even to the extent of extending tribal taxing authority into “Indian Country”. **The negative fiscal impact could be many millions of dollars in lost state revenue in subsequent years if Navajo-taxing authority extends to areas adjacent to U.S. Highway 550 and Interstate 40.** Presumably, some time would pass before such an impact would be realized.

SOURCES OF INFORMATION

Responses Received From
State Highway and Transportation Department

SUMMARY

Synopsis of Bill

SB867 would allow the Taxation & Revenue Department to enter into a cooperative agreement with the Navajo Nation regarding administration and collection of the state Special Fuel Excise Tax and a similar tax imposed by the Navajo Nation. The full amount of the Navajo Nation tax would be credited against the state's tax, effectively eliminating the state's tax within Navajo Nation boundaries. The Navajo Nation tax credit would operate on transactions "*taking place on land owned by or for the benefit of the Navajo Nation and located within the exterior boundaries of the Navajo Nation*".

SB867 has a July 1, 2003 effective date.

FISCAL IMPLICATIONS

As noted in the tables above, the revenue loss for this bill could be from \$1.1 million or more dependent upon how the geographic area where the Navajo Nation fuel tax can be imposed is defined. Also, it is highly likely that if SB867 becomes law, the Legislature may find it necessary to extend equal treatment to all tribes and pueblos, in which case the negative fiscal impact could be *additional* tens of millions of dollars.

The State Highway and Transportation Department notes that SB867 contains several ambiguities which causes questions regarding the geographic application of this bill and could have grave fiscal implications to state revenues.(see legal issues).

It should be noted that the State Highway Department has pledged the special fuel tax for repayment of highway debentures for the next 12 years; SB867 will divert some this revenue.

LEGAL ISSUES

The State Highway and Transportation Department legal staff conducted a review of SB867 and have noted the following. The Taxation and Revenue Department (TRD) legal staff also conducted an analysis similar to the Highway and Transportation Department's legal analysis that is presented below. The TRD analysis may be somewhat more conclusive in asserting that the geographic definition in the bill is greatly expanded beyond "Reservation" boundaries and may include extension of Tribal taxing authority into "Indian Country".

Senate Bill 867 contains several ambiguities, which shroud the geographic scope of its application in significant uncertainty.

First, the Bill states it applies to transactions "*taking place on land owned by or for the benefit of the Navajo Nation and located within the exterior boundaries of the Navajo Nation*." However, which lands of northwestern New Mexico are "*within the exterior boundaries of the Navajo Nation*" and which lands are not is far from clear. It is noteworthy that the language used is "Navajo Nation" not "Navajo Indian Reservation." The New Mexico Supreme Court has interpreted Navajo Indian Reservation as including much less area than the area populated largely by Navajo people, included in the areas covered by Navajo government local Chapters and Navajo Nation Council legislative districts, which seemingly may be encompassed in the broader rubric of "Na-

vajo Nation.” See *General Motors Acceptance Corp. v. Chischilly*, 96 N.M. 113, 628 P.2d 683 (1981).

It is plausible that the “exterior boundaries of the Navajo Nation” language could be interpreted as synonymous with the term “Indian Country” which is a legal term of art in the area of federal-tribal-state jurisdiction. See 18 U.S.C. 1151. Transactions occurring within Indian Country are subject to the jurisdiction of the federal government, perhaps subject to the tribe’s jurisdiction, and generally state jurisdiction is barred. The term “Indian Country” has three components:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The first component is essentially the Navajo Indian Reservation, which occupies a relatively small area in northwest New Mexico. However the area arguably subject to the second and third components, Indian dependent communities and allotments, appear to occupy most of the area in New Mexico north of I-40 from the Arizona state line to near Grants, with its eastern boundary approximating the route of US 550 from Cuba to Bloomfield. See *State v. Frank*, 132 N.M. 544, 52 P.3d 404 (2002) (whether US 550 at the community of Naagezi, 74 miles northwest of Cuba, constitutes a dependent Indian community) and *Pittsburgh & Midway Mining Co. v Watchman*, 52 F.3d 1531 (10th Cir. 1995) (whether coal mine located between Gallup, N.M. and Window Rock, Az. is located within a dependent Indian community). Consequently the geographic area impacted by this Bill, hence the number of transactions impacted, is subject to widely varying interpretations.

Much of the land in northwest New Mexico was divided into allotments and conveyed to individual tribal members. Apart from the issue concerning the exterior boundary language, it is unclear whether allotments are considered land “for the benefit of the Navajo Nation” as the federal trust status of this land generally subjects it to tribal jurisdiction. Also, much of the land in northwestern New Mexico has had the mineral estate severed from the surface estate. Is the ownership referred to in the language of the Bill only surface estate ownership or is ownership of the mineral estate sufficient?

Linkage of the tax credit to land ownership decidedly complicates, hence increases the expense of effective enforcement, as enforcement officers would be required to research the property records at the County Clerk and Recorders’ offices and property records for the trust lands which are held by the Bureau of Indian Affairs in order to determine whether a particular transaction is eligible for the tax credit.

DUPLICATIONS

SB867 and HB571 are duplicates

TECHNICAL ISSUES

The State Highway and Transportation Department believes it is unclear whether the tax credit could go into effect before a cooperative agreement is in place. “*The Navajo Nation Tax shall:*

... be subject to a cooperative agreement ... that is in effect at the time of the taxable transaction.” Presumably, the intent is to have the cooperative agreement in place before the state tax credit would apply.

OTHER SUBSTANTIVE ISSUES

- The Taxation and Revenue Department has already entered into an information sharing agreement with the Navajo Nation to assist monitoring and compliance of fuel tax activity.
- The Navajo Nation Fuel Tax is 18 cents per gallon, the same as the state tax rate imposed on special fuel.
- Article IX, Section 16 of the New Mexico State Constitution provides that *“the Legislature shall not enact any law which will decrease the amount of the annual revenues pledged for the payment of state highway debentures or will divert any such revenues to any other purpose so long as any of said debentures issued to anticipate the collection thereof remain unpaid.”* The Department has pledged the current special fuels tax revenue stream to outstanding bonds for the next 12 years.

PRF/sb/njw